SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 255

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GERHART EISLER,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.**

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DAVID REIN,
ABRAHAM J. ISSERMAN,
*1105 K Street, N. W.,*
*Washington 5, D. C.;*
CAROL KING,
*220 Broadway,*
*New York 7, New York;*
JOSEPH FORER,
*1105 K Street, N. W.,*
*Washington 5, D. C.,*
*Counsel for Petitioner.*

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Gerhart Eisler prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia affirming the judgment of the United States District Court for the District of Columbia, adjudging the petitioner guilty after conviction and imposing sentence under Rev. Stats. § 102, as amended by Act of June 22, 1938, c. 594, 52 Stat. 942, U. S. C. title 2, § 192.

### Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia has not yet been officially reported. It appears in the record at 233-245.

## Summary Statement of Matter Involved

Gerhart Eisler, the petitioner herein, is an Austrian national (R. 117), a member of the German Communist Movement (R. 222), who came to the United States in June, 1941 as a political refugee en route to Mexico under a transit visa (R. 113, 144). At the trial, the Court excluded evidence proffered to prove that Eisler was detained in this country against his will by the government's cancellation of his transit visa and its refusal to grant his numerous requests for permission to leave the country (R. 95-98, 115, 116).

On January 24, 1947, the House Committee on Un-American Activities served a subpoena requiring Eisler to appear before the Committee in Washington on February 6, 1947 (J. A. 13, 22, 23). Thereafter, Eisler prepared for his forthcoming appearance by conferring with counsel, preparing a statement, buying railroad tickets to Washington for himself and his wife, and making Washington hotel reservations (R. 122, 110, 111).

On February 4, 1947, Eisler was arrested in New York as an "enemy alien" by two security officers of the Immigration and Naturalization Service of the Department of Justice (R. 80, 81, 82, 123). At the trial, the Court excluded evidence proffered to prove that this arrest was illegal, in that (a) Eisler was, as the Department of Justice knew, an Austrian national and hence not an enemy alien, (b) the arresting officers neither had nor exhibited a warrant of arrest, and (c) the government had earlier discontinued the arrest and internment of enemy aliens (R. 80, 82, 87-92, 98, 102, 108, 109). The Court also excluded evidence offered to prove that this illegal arrest was instigated by the Un-American Activities Committee of the House of Representatives for the purpose of having him brought before the Committee and to punish him for his political beliefs and to

prevent his departure from the United States and his return to Germany (R. 79, 80, 88-90, 100-102, 124, 213).

Eisler was taken by the arresting officers to Ellis Island (R. 124), and on the next day (February 5) was taken, still in the custody of the Immigration officers, to Washington, D. C. There he was confined in the District jail overnight (R. 83, 125). On February 6, 1947, he was taken in the same custody, to the hearing room of the Committee on Un-American Activities (R. 13, 30, 85). During the hearing he was still in custody (R. 81).

At the hearing, the following occurred (read into the record from a transcript of the hearing (R. 43-37)):

> The Chairman.[1] Now, Mr. Stripling, call your first witness.
>
> Mr. Stripling: Mr. Gerhart Eisler, take the stand.
>
> Mr. Eisler: I am not going to take the stand.
>
> Mr. Stripling: Do you have counsel with you?
>
> Mr. Eisler: Yes.
>
> Mr. Stripling: I suggest that the witness be permitted counsel.
>
> The Chairman: Mr. Eisler, will you raise your right hand?
>
> Mr. Eisler: No. Before I take the oath——
>
> Mr. Stripling: Mr. Chairman——
>
> Mr. Eisler: I have the floor now.
>
> Mr. Stripling: I think, Mr. Chairman, you should make your preliminary remarks at this time, before Mr. Eisler makes any statement.
>
> The Chairman: Sit down, Mr. Eisler.
>
> Now, Mr. Eisler, you will be sworn in. Raise your right hand.
>
> Mr. Eisler: No.
>
> The Chairman: Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation.
>
> Mr. Eisler: I am not treated as a guest.

[1] The Chairman of the hearing was Representative J. Parnell Thomas (R. 13, 14). Mr. Stripling is the Committee's Chief Investigator (R. 26). Mr. Mundt and Mr. Rankin are members of the Committee.

The Chairman: This committee——

Mr. Eisler: I am a political prisoner in the United States.

The Chairman: Just a minute. Will you please be sworn in?

Mr. Eisler: You will not swear me in before you hear a few remarks.

The Chairman: No; there will be no remarks.

Mr. Eisler: Then there will be no hearing with me.

The Chairman: You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?

Mr. Eisler: I am ready to answer all questions, to tell my side.

The Chairman: That is not the question. Do you refuse to be sworn in? All right.

Mr. Eisler: I am ready to answer all questions.

The Chairman: Mr. Stripling, call the next witness. The committee will come to order, please. What is the pleasure of the committee?

Mr. Stripling: Mr. Chairman, I think that the witness should be silent, or take the stand or be removed from the room, one or the other, until this matter is determined.

Mr. Mundt: Mr. Chairman, suppose you ask him again whether he refuses to be sworn.

Mr. Rankin: Not 'sworn in' but to be sworn.

The Chairman: Mr. Eisler, do you refuse, again to be sworn?

Mr. Eisler: I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. It is 3 minutes.

The Chairman: I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why it will be agreeable to the committee. But first you have to be sworn.

Mr. Eisler: That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing.

The Chairman: Then you refuse to be sworn.

Mr. Eisler: I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement.

The Chairman: We will give you those 3 minutes when you are sworn.

Mr. Eisler: I want to speak before I am sworn.

Thus, it is clear that, although the petitioner wished to make a three-minute statement before being sworn, he was ready and willing to be sworn and to testify.

The Committee then voted to cite Eisler for contempt (R. 52, 53).

On February 27, 1947, an indictment was filed charging that Eisler failed and refused to be sworn to testify before the Committee, "and thereby on February 6, 1947, within the District of Columbia, willfully did make default" (R. 214, 215). Eisler was arraigned before Chief Justice Laws on April 22 (R. 230). Immediately prior to the arraignment, Carol King was admitted by Chief Justice Laws to the bar of the Court *pro hac vice*, and entered her appearance as counsel of record for the petitioner (R. 229, 230).

On May 23, 1947, the motion to dismiss the indictment was argued before and denied by Justice Holtzoff (R. 4, 221). On May 29, Eisler filed an affidavit alleging bias and prejudice on the part of Justice Holtzoff (R. 222-226). The affidavit was accompanied by a certificate of Carol King, counsel of record, that it was made in good faith and not for hindrance or delay (R. 226). The affidavit recited, in substance, that Justice Holtzoff had, while legal adviser to the FBI, participated in FBI investigations of aliens and Communists, including an investigation of Eisler, who is an alien Communist, and also that Justice Holtzoff had a personal hatred of Communists, as shown by his sponsoring of anti-Communist legislation and his friendship with and admiration of J. Edgar Hoover, who has used highly intemperate language regarding Communists.

The affidavit further stated that the affiant, and his counsel had first learned on May 20, 1947 that Justice Holtzoff was to try the case; that on the same day the petitioner asked his New York counsel if he was obliged to go to trial before Justice Holtzoff in view of the Justice's previous connections with the FBI; that New York counsel arranged to discuss on May 23 in Washington, D. C. with Washington counsel, the possibility of filing such an affidavit, but that because of the sudden death of the chief trial counsel's brother on May 23, the conference had to be postponed till May 27. The affidavit was executed in New York City on May 28, 1947.

The trial began on June 4, 1947 (R. 3, 231) before Justice Holtzoff, who on that day, struck the affidavit of prejudice and refused to disqualify himself (R. 3-6). Thereafter, Justice Holtzoff presided throughout the trial, gave sentence, and signed the judgment (R. 232).

During the course of the trial, the trial court continuously reprimanded and harassed defense counsel, both in and out of the presence of the jury (e.g., R. 33-35, 42, 45-46, 50-52, 54, 91, 92, 95, 96, 108, 109, 133-5, 136). Limitation of space will permit us to give only two brief examples:

(1) Mr. Isserman: I ask that that remark be stricken as not being responsive.

The Court: It may be stricken. Just state your motion; do not argue.

Mr. Isserman: I have not argued; I just stated my ground. (R. 42)

(2) By Mr. Isserman:

Q. Mr. McInerny, I now ask you whether or not Defendant Gerhart Eisler from his arrival in the United States in June, 1941, applied for any change of status from his status as to being here on a transit visa, up to and including February 4, 1947?

Mr. Hitz: I object.

The Court: Objection susthined.

Mr. Isserman: I offer to prove that this witness, if allowed to answer, would state that the defendant, Gerhart Eisler, never applied for change in status.

The Court: Well; you mean you expect him to say no. That is the offer of proof.

Mr. Isserman: No.

The Court: Because your question calls for a yes or no answer.

Mr. Isserman: May I have the question read, please?

The Court: No, you may proceed.

Mr. Isserman: Well, Your Honor, I would like to——

The Court: You ought to know how to make an offer of proof.

Mr. Isserman: I am asking the stenographer to tell me what I asked. I want to make sure the defendant's point is covered.

The Court: You may do it this time but don't do it again. You ought to know your own question (R. 95-96).

The trial court itself acknowledged that its conduct would and did prejudice the petitioner before the jury (R. 51, 190). The court stated to defense counsel (R. 51), early in the trial: "If you are not going to be urbane and courteous, I shall the next time I have to call attention to the fact do it in the presence of the jury." And in justification of its conduct during the trial, the court said in the course of the argument on the motion for new trial: "If counsel oversteps the bounds, I think the Court has a right to check counsel. *It is unfortunate that the defendant suffers*"[2] (R. 190).

In addition, the court made inconsistent rulings favorable to the prosecution and prejudicial to the petitioner as follows:

(a) Prosecution witnesses could not be interrupted by objection, but must be allowed to finish answers (R. 14, 15, 21, 39, 42-47); but defense witnesses could be interrupted both by government counsel (R. 99, 113, 122, 124) and by the court (R. 114, 117, 129, 143).

[2] Emphasis added.

(b) The prosecution was permitted to show that petitioner had counsel present (R. 27), and to argue that if legal objections were to be made, counsel was to make them (R. 49, 165); but the defense was not allowed to show that the committee practice was not to permit counsel to speak (R. 107, 150), and that counsel had accordingly instructed petitioner to make his own legal objection (R. 146, 149, 150).[3]

(c) The defense counsel was not permitted to introduce evidence as to what the petitioner wished to say before the Committee (R. 133-135), but the prosecution was permitted to argue, over objection, its version of what the petitioner intended to say (R. 166-168).

(d) The defense was not allowed to show that petitioner would have answered questions if permitted to make a three minute objection (R. 121, 135), but the prosecution was permitted to show that the petitioner would not have answered questions (R. 140-147).

Further the trial court assumed the role of the prosecution and conducted a hostile cross-examination of the petitioner (R. 131, 132, 143, 145, 146), and refused in violation of Rule 30 of the Rules of Criminal Procedure to permit defense counsel to object to its charge out of the presence of the jury (R. 177).

At the trial, the prosecution presented no evidence to show the matter on which the petitioner had been summoned before the committee. The trial court, however, refused to grant petitioner's motion for a directed verdict of acquittal based on this failure of the prosecution to prove an essential element of the offense as defined by the statute, U. S. C., Title 2, § 192, and as charged in the indictment (R. 154). Moreover, the trial court refused to permit the petitioner

[3] It should be noted that the majority opinion of the appellate court considered it "important to note that appellant was accompanied to the hearing by his legal counsel" (R. 239). The majority opinion, however, did not comment on the inconsistent rulings of the trial court on this question, although the point was briefed and argued before the court below.

to introduce evidence to show that he was not summoned on a matter committed to the committee by Congress (R. 101, 102, 104, 105, 119, 120). The court also excluded evidence to show that the petitioner wished only, in the three minutes he requested, to make a legal objection to his unlawful arrest before the committee and that having made such objection, he would willingly have taken the oath and testified (R. 119, 120, 126, 133-135, 138, 139, 146, 149, 150). The trial court, further, refused to instruct the jury that the petitioner had a right to make a legal objection before the committee, and could not be found guilty of contempt if he insisted on the exercise of that right and was otherwise willing to be sworn and testify freely (R. 180).

The defense contention was that Eisler had not refused to be sworn, but had merely tried to make a legal objection to the committee. This issue was clearly one of fact for the jury. The court, however, as we have shown, refused to submit this issue to the jury. Instead, it charged that the defendant had on several occasions "either refused categorically" to be sworn or "refused except on special conditions, that he specified" (R. 173). The court then charged, "The law is that a witness does not have the legal right to dictate the conditions on which he will or will not take the oath as a witness" (R. 173, 177). The court thus removed from the jury the only and key issue of fact by itself making a finding thereon adverse to the petitioner. It thus, in effect, directed a verdict of guilty.

The jury returned a verdict of guilty (R. 3). Motions for new trial and for arrest of judgment were argued and denied on June 27, 1947, and on the same date the court gave the maximum sentence—one year's imprisonment and a fine of $1,000 (R. 3, 212, 232). Notice of appeal was filed on June 27, 1947 (R. 2).

On June 14, 1948, the Court of Appeals for the District of Columbia affirmed the judgment below, with Justice Prettyman dissenting (R. 241-245). The grounds of the

dissent were (1) that the trial court should have disqualified itself on the filing of the affidavit of bias and prejudice; (2) that the trial court erred in refusing to permit the petitioner to testify that he wished only to make a legal objection before the committee; (3) that the prosecution failed to prove that petitioner was summoned to testify on a matter of inquiry submitted to the committee by Congress and (4) the general conduct of the trial. A petition for rehearing was thereafter filed and denied on July 17, 1948 (R. 247-252).

## Statement as to Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1948 (R. 246). A petition for rehearing was denied on July 17, 1948 (R. 252). By order dated August 2, 1948, Chief Justice Vinson extended the time for filing this petition for certiorari to and including September 1, 1948. (R. 252).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. § 347(a).

## Statutes Involved

The following statutes are set out in the Appendix to this petition:

(a) Rev. Stats. § 102, U. S. Tit. 2 § 192.
(b) Sec. 21 of Judicial Code, Tit. 28 § 25.
(c) Sec. 121(b), Legislative Reorganization Act of 1946.
(d) Geneva Convention on Prisoners of War, Article 3.

## Questions Presented

1. Did the trial court err by failing to disqualify itself upon the filing of the affidavit of bias and prejudice?

a. Was the affidavit of bias and prejudice, which alleged that the trial judge, prior to his elevation to the bench,

participated as a government official in an investigation of the petitioner out of which the present case arose, and had a personal hatred of Communists, a class which included the petitioner, substantively sufficient?

b. Was the affidavit of bias and prejudice, which was filed nine days after notice of assignment of the trial judge, but six days before the trial began, timely filed, where this lapse of time was due to the death of the brother of the chief trial counsel, and the need for conference and investigation.

2. Was the conduct of the trial court during the trial such as to deny the petitioner his constitutional rights to a fair trial under the Fifth Amendment, and to call for an exercise of this Court's power of supervision?

3. Was the court's charge to the jury, which, in essence, usurped the jury's function as a trier of facts, and directed a verdict of guilty, erroneous and a denial of the petitioner's right to trial by jury under the Sixth Amendment?

4. Did the trial court err in its refusal to direct a verdict of acquittal in view of the fact that the prosecution had failed to introduce any evidence to show that the petitioner was summoned on a matter of inquiry committed to the committee by Congress; was the conviction of the petitioner in the absence of any evidence that the committee was acting in aid of a legislative function a denial of the petitioner's constitutional rights under the Fifth, Ninth, and Tenth Amendments?

5. Did the trial court err in refusing to permit the petitioner to introduce evidence to show that he was not summoned on a matter of inquiry committed to the committee by Congress; did the refusal to permit petitioner to show that the Committee was acting beyond its authority and

not in aid of a legislative function deny the petitioner constitutional rights under the First, Fifth, Ninth, and Tenth Amendments?

6. Did the trial court err in refusing to permit the petitioner to introduce evidence to show he wished only to make a legal objection to the committee's procedure but was otherwise willing to be sworn and to testify; was it error for the trial court to refuse to instruct the jury that the petitioner had a right to make a legal objection before the committee, and could not be convicted of contempt if he insisted on that right, but was otherwise willing to be sworn and to testify; did such error constitute a denial of the petitioner's constitutional rights under the Fifth, Ninth and Tenth Amendments?

7. Was the petitioner required to testify before the Committee although he was illegally arrested at the Committee's instance and brought before the committee in custody; was the petitioner entitled to make a legal objection to such unlawful arrest prior to being required to testify; was the conduct of the committee in causing the petitioner's illegal arrest and refusing to permit him to make an objection to such arrest a denial of the petitioner's constitutional rights under the Fifth, Ninth and Tenth Amendments?

8. Were the petitioner's efforts to state, prior to being sworn and in accordance with the Committee's practice, a legal objection to the unlawful conduct of the Committee in causing his arrest, a wilful default within the meaning of U. S. C. Title 2, § 192?

9. Is a refusal to be sworn, qualified or otherwise, a default within the meaning of U. S. C. Title 2, § 192?

10. Did the court err in charging the jury that "willfully" as used in U. S. C. Title 2, § 192 required only that

the appellant had acted intentionally and deliberately, as contrasted with accidentally and inadvertently?

11. Was the petitioner, as an alien in transit detained in this country by governmental authorities against his will, required to testify before a Congressional committee?

12. Was the petitioner as an interned enemy alien entitled to the rights of a prisoner of war; as a prisoner of war could he be required under the Geneva Convention to testify before a Congressional committee?

13. Is the authority of the House Committee on Un-American Activities to compel testimony under the sanction of punishment for contempt, on its face and as applied generally and in the present case, unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments and Article I, section 9 of the Constitution?

14. Is the statute establishing the House Committee on Un-American Activities, on its face and as construed and applied by the Committee, unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments and Article I, section 9 of the Constitution?

## Reasons for Granting the Writ

The writ should be granted because (1) the issues involved have not heretofore been determined by the Court; (2) they are of great public importance; (3) the decision below sanctioned by the trial court so far a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision; (4) the decision below contravenes principles established by decisions of this Court. We will discuss these reasons for granting the writ in connection with each of the questions presented by this petition.

### 1. The Case as a Whole

The petitioner has been sentenced to serve a year in jail and pay a $1,000 fine because he tried to make a three-minute statement before the House Committee on Un-American Activities, which had procured his ignominious arrest, detention and public humiliation in order to punish him for his political views.[4]

This case thus represents a modern American version of the feudalistic offense of lèse majesté.

If the petitioner serves the sentence he will be no less a political prisoner because he had a trial. The trial, as we have shown, was one in which the petitioner was not allowed to make his defense, in which the prosecution was favored by the judge (who had refused to disqualify himself for bias), and in which the judge exhibited prejudice and hostility before a jury he virtually directed to convict.

Obviously, the petitioner's real "offense" is that he is a Communist, and the trial below stands for the proposition that a Communist is not entitled to a fair trial before being imprisoned. This is apparently the view of the House Committee on Un-American Activities and the Attorney General.[5]

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[4] That this was the Committee's purpose is clear from the record (R. 79, 80, 88, 90, 100-102, 124). We also invite the Court's attention to the statements made by a majority of the committee members on the House floor, in the course of debate on the resolution to cite the petitioner for contempt. See 93 Cong. Rec. 1177-1180 (Rep. Nixon), 1181-1182 (Rep. Rankin), 1182-1184 (Rep. Bonner), 1184-1186 (Rep. Mundt), 1186-1187 (Rep. Vail).

[5] Compare the following colloquy when the Attorney General appeared before the subcommittee on legislation of the Committee. Hearings before the Subcommittee on Legislation of the Committee on Un-American Activities, 80th Cong., 2d sess., on H.R. 4422 and H.R. 4581, February 5, 1948, p. 31 (emphasis added):

> MR. VAIL: • • •
>
> Mr. Clark, how would you feel about legislation preventing convicted aliens from being released on bail bond pending appeal of their convictions?

We submit that our constitutional tradition requires a different standard in the federal courts. See *Chambers* v. *Florida*, 309 U. S. 227, 241.

### 2. Issues Involving the Affidavit of Bias and Prejudice

This case presents to this Court the issue whether Sec. 21 of the Judicial Code, Tit. 28, § 25 [6] is to be applied in accordance with its purposes and intent, or whether it is to be nullified by judicial construction.

The majority below held that a trial judge who, as characterized by Justice Prettyman in his dissent (R. 242), "had

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MR. CLARK: Convicted aliens?

MR. VAIL: I am thinking, for example of the *Eisler* case.

MR. CLARK: I see. The alien that has been convicted?

MR. VAIL: Yes.

MR. CLARK: Should not be released on bail—well, sir, I think that that would go a little far. I think it depends upon the individual. You take Eisler, for example. I ordered him picked up the other day. What I pointed out in my statement here was that we have this problem of aliens that we have ordered deported that continued to carry on the same type of activities that we based the deportation upon, but we are unable to keep them in custody because the courts have held that we can't do that except during the period when we try to get the papers.

*So the other day I ordered Mr. Eisler picked up for deportation because he had been making speeches over the country that were derogatory to our form of government and our way of life*, and we had a case down here against him also, but I think that a blanket provision that would not permit bail would go mighty far in that direction. I think you largely have to leave it up to the courts.

MR. VAIL: I don't think we went too far in the *Eisler* case or that it would go too far in a case similar to the *Eisler* case.

MR. CLARK: That is a case in the courts, and I would rather not discuss it, sir.

MR. VAIL: Well, you are certainly to be complimented for the action taken in that case because I happen to know something about the activities of Eisler during the period he was out on bail bond, and it seems to me there should be something done to curb that.

MR. CLARK: I shall always and the Department of Justice shall always bear in mind foremost the civil rights of the people, whether they be citizens or not, *but we shall also bear in mind that the 140,000,000 Americans are entitled to protection from those who try to force upon them a foreign ideology.*

[6] Now Tit. 28 § 144.

been the active legal advisor to the investigator in the very investigation" which gave rise to the indictment of the petitioner might nevertheless sit in judgment upon that petitioner. In so holding, the majority refused to follow the ruling of the same court in *Barsky* v. *Holtzoff*, April Term 1947, Misc. 126, U. S. App. D. C., decided June 11, 1947, rehearing denied, June 12, 1947, in which the Court of Appeals for the District of Columbia held on a virtually identical affidavit of bias and prejudice, that Justice Holtzoff was required to disqualify himself. The majority, however did not see fit to mention or distinguish the *Barsky* case, although Justice Prettyman considered it to be controlling (R. 242). The decision below thus nullified the Congressional intent embodied in U. S. C. Title 28, § 25, which provides that upon the filing of an affidavit of bias and prejudice by a party to an action, the trial judge must disqualify himself. Although this Court has never passed upon a similar factual situation, the decision is in conflict with the doctrine of this Court established in *Berger* v. *United States*, 255 U. S. 22, 35, 36, that the statute's "solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial." The issue is of greatest public importance since it concerns the public confidence in our courts.

Many of our judges presently sitting in the federal district courts, have previously occupied positions with the federal government, a good many of them with the Department of Justice. Thus, the question as to whether a trial judge should, upon the filing of an affidavit of bias and prejudice, sit in judgment in cases or on individuals whose cases he dealt with while occupying a governmental position prior to his elevation to the bench[7] may frequently recur.

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[7] Cf. Section 5(c) of the Administrative Procedure Act, 5 U. S. C. § 1004(c).

The majority below, with Justice Prettyman dissenting, held that the affidavit was not timely since it was filed nine days after notice of assignment of the trial judge, but nevertheless six days before the trial began, and although the lapse of time was caused by the death of the brother of the chief trial counsel and the need for conference and investigation. The statute literally requires the filing of the affidavit "not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time." (This same provision is carried over into the new Judicial Code 28 U. S. C. Sec. 144.) Both the majority and minority below agreed that this portion of the statute cannot be applied to a jurisdiction such as the District Court for the District of Columbia where the court is in continuous session and where a number of judges sit in rotation and the identity of the trial judge is not known until shortly before trial. This Court has never determined the nature of the time requirement, if any, within which affidavits must be filed in such jurisdictions. The question is of great public importance since most of the District Courts in populous areas function in the same fashion.

The decision below is illustrative of a tendency in the lower courts to apply the statute narrowly and technically, thus nullifying the intent of the statute and the doctrine of the *Berger* case, *supra*. See *Frank, Disqualification of Judges*, 51 Yale L. J. 605, 629. This Court must determine whether this important statute, enacted to preserve confidence in the courts and to protect litigants from possibly biased judges, is to receive a fair and liberal interpretation or a negative, narrow and grudging one. The majority below apparently conceived that affidavits of this character must be filed almost instantaneously (R. 236), ignoring the important considerations stressed by Justice Prettyman in his dissent that such affidavits "should be prepared with the utmost care and certainty as to the facts" and that the

"courts should encourage careful consideration and deliberation on the part of counsel" (R. 243). This conception of the majority below is inconsistent with the conception of the Eighth Circuit Court of Appeals in *Morris* v. *United States*, 26 F. (2d) 444.

In his dissent, Justice Prettyman also indicated that since there were twelve active judges in the District Court for the District of Columbia, "other judges were available so that the trial would not have been delayed" (R. 243).[8]

### 3. Issues Involving the Conduct of the Trial

We have summarized briefly above the conduct of the trial court during the course of the trial, giving record citations. A trial judge should be held to a high and unyielding standard in the execution of his oath of office. The first of the Canons of Judicial Ethics of the American Bar Association calls on the judge to be courteous to counsel. The fifth canon requires that he be "temperate, attentive, patient, impartial." So important to the judiciary is the preservation of public confidence and respect that the judge must not only *be* impartial, he must *appear* impartial as well. *Whitaker* v. *McLean*, 73 App. D. C. 259, 118 F. (2d) 596; *Egan* v. *United States*, 52 App. D. C. 384, 397, 287 Fed. 958, 971. Nor may a trial court participate excessively in examining defense witnesses, particularly in cross-examination of a defendant. *Adler* v. *United States*, 182 Fed. 464; *Martuci* v. *Brooklyn Children's Aid Society*, 140 F. (2d) 732; *Williams* v. *United States*, 93 F. (2d) 685.

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[8] In the *Berger* case, *supra*, the Supreme Court, in answering the argument that to permit disqualification of judges upon the mere filing of affidavits would lead to abuses, said at p. 35:

> And in this there is no serious detriment to the administration of justice, nor inconvenience worthy of mention; for of what concern is it to a judge to preside in a particular case? Of what concern to other parties to have him so preside?

The record here is convincing that the trial court exhibited an active bias, hostility and prejudice toward the petitioner throughout the trial and in the sentencing. The trial judge was, when measured by the canon's requirements, discourteous to counsel, intemperate, impatient, partial. He was not impartial and did not appear to be impartial. He discriminated in his treatment of the defense and the prosecution. He applied restrictive rules to the defense alone. He exacted retribution for fancied slights, as in refusing to entertain offers of proof (R. 109, 110). Under the guise of expediting the trial, he prolonged it by unnecessary harassing of counsel and petty bickering. He rebuked and ridiculed defense counsel without cause. He minimized defense evidence. His inconsistencies in ruling on admissibility of evidence were adverse to the defense. In his raising of objections and in his cross-examination of the petitioner he came close to conducting the prosecution. Worst of all, this misconduct seems to have been, to some extent at least, intended. The record shows that the trial judge realized the effect his rebukes would have on the jury; he threatened defense counsel to that effect (R. 51), and, after carrying out his threat, justified his action on the ground that a defendant must suffer for his attorney's supposed lack of urbanity (R. 190).

The trial court justified some of its actions on the basis that defense counsel was provocative. But the court itself conceded that the record reveals no such conduct by counsel (R. 190, 191). But even were such the case, it would not remedy the error, since provocative conduct by counsel cannot justify prejudicial conduct by the Court. *Lambert* v. *United States*, 101 F. (2d) 960; *Commonwealth* v. *Stallone*, 281 Pa. 41, 126 Atl. 56.

Finally, in its charge to the jury, the Court removed from the jury the only issue of fact before it, instructed the jury that the petitioner had refused to be sworn, except on a

condition which he had no right to make, and thus virtually directed a verdict of guilty. Under the doctrine of this Court, such an instruction deprived the petitioner of his constitutional right to a trial by jury, *Starr* v. *United States*, 153 U. S. 614, 624-626. See also *Rudd* v. *United States*, 173 F. 912, 914.

In addition, the hostile conduct of the trial court deprived the petitioner of a fair trial and denied him the due process guaranteed by the Fifth Amendment.

Further, the trial court in its conduct so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This supervision is especially called for in this case. The petitioner is an alien Communist caught in the "near-hysteria" engendered against Communists in this country. See Report of the President's Committee on Civil Rights, *To Secure These Rights*, p. 49. The trial judge, having stricken the affidavit of bias and prejudice, was under a moral responsibility to preserve the prestige of the judiciary by exercising the greatest possible caution to avoid any appearance of judicial bias. His conduct, however, fully bore out the apprehensions voiced in the affidavit.

Under these circumstances, it is especially important for this Court to vindicate the American tradition of equal justice before law, and of due process to citizen or alien, "of whatever race, creed or persuasion." See *Chambers* v. *Florida*, 309 U. S. 227, 241.

### 4. Issues of Judicial Review in Contempt Proceedings under 2 U.S.C. sec. 192

The indictment in this case alleged that Eisler was summoned to testify "upon matters of inquiry committed to" the Committee on Un-American Activities (R. 215). This was an essential allegation under the statute, and had to be pleaded and proved by the prosecution. *Sinclair* v.

*United States*, 279 U. S. 263, 296, 297. Yet, as we have seen, no evidence of any kind was introduced at the trial on this point. Hence, as Justice Prettyman held in his dissent (R. 244-5), the trial court erred in its denial of the motion for judgment of acquittal. The majority opinion below does not discuss this point, although it was briefed and argued.

Furthermore, as we have seen, the trial court refused to allow introduction of evidence offered to prove that the petitioner had been summoned by the Committee not to testify on matters committed to it but for harassing, illegal, non-legislative purposes.

The trial court and the court below by affirming, have thus overruled the long-established doctrine of this Court that Congressional committees may compel attendance of witnesses and testimony only in inquiries within Congress' limited powers. *Kilbourn* v. *Thompson*, 103 U. S. 168; *In re Chapman*, 166 U. S. 61; *McGrain* v. *Daugherty*, 273 U. S. 135; *Jurney* v. *MacCracken*, 294 U. S. 125.

If the decision below stands, what then has become of Justice Brandeis' assurance that "assertions of Congressional privilege are subject to judicial review?" *Jurney* v. *MacCracken, supra*, at 150. And see 26 Cong. Globe 439, 440, 34th Cong., 3d Sess., remarks of Senator Bayard, for Congress' own realization of the need for judicial review to protect individuals from unwarranted legislative inquisition. Cf. 8 Wigmore, Evidence (3d ed.) § 2195, p. 80. And it is clear that the contempt statute may not be constitutionally applied where, as in the present case, the inquiry involved was not within Congress' powers. *In re Chapman*, 166 U. S. 661; *Sinclair* v. *United States, supra; Jurney* v. *MacCracken, supra.*

To deny the right of judicial review to one brought into court on a charge of contempt under Tit. 2, § 192, is to repudiate our constitutional form of government. Certainly

there is no reason for the doctrine that actions of Congressional committees are not subject to check in accordance with the Constitution and statutes to the same extent as are actions by officials of the executive department or the judiciary. It is necessary therefore that this Court review and reverse the dangerous doctrines established by the decisions below that when legislative committees invoke the sanctions of Tit. 2, § 192, the courts are precluded, in such prosecutions, from determining whether the witness sought to be punished was called before the committee on a matter within the jurisdiction of Congress and the committee.

### 5. Issues Involving Procedure before Congressional Committees, and the Interpretation of Title 2, § 192

(a) The trial court excluded evidence offered to show that the petitioner wished only to make a legal objection to his unlawful arrest by the committee, and was otherwise willing to be sworn and to testify. The Court also refused, although requested, to instruct the jury that if the petitioner wished only to make a legal objection to the committee's procedure, and was otherwise willing to be sworn and to testify, he should be acquitted. For the purposes of this appeal, it is therefore established that the petitioner wished only to make a legal objection to the committee's procedure, and was otherwise willing to be sworn and to testify. That a witness has the right to state an objection to the procedure or the questions of a Congressional committee either directly or through counsel is elementary due process, see *Townsend* v. *United States*, 95 F. (2d) 352, 361. The Chairman of the Committee, himself, testified that this is established procedure before the Committee (R. 49; See majority opinion at 238). The petitioner therefore was certainly not guilty of a wilful default within the meaning of Tit. 2, § 192, however "wilfully" may be defined, if

he wished only to object to the committee's procedure in conformity with the practice recognized by the Committee as proper.

Justice Prettyman's dissent considered these actions of the trial court to be reversible error (R. 243-4). The majority below, however, misconceived the issue. The issue was whether the jury should have been allowed to pass on the factual question as to whether or not the petitioner merely wished to make a legal objection; if so, obviously evidence on the subject should have been allowed and the jury should have been appropriately instructed. The majority, however, instead of deciding what was relevant for the jury, itself found as a fact that the petitioner had not wished to make a legal objection (R. 238). Thus both the majority below and the trial court committed error by finding a disputed fact in a criminal prosecution, thus usurping the constitutional function of the jury.

(b). The trial court and the court below rejected the petitioner's contention that a refusal to be sworn is not a default within the meaning of Tit. 2, § 192. But the petitioner's contention is supported by the legislative history of the statute, dictionary, commentators' and judicial construction of the word "default." 34 Cong. Globe 405, 406; 3 Oxford Eng. Dict. (1933) 126, quoting the 1828 Webster; Black's Law Dict. (3rd ed. 1933) 539; 3 Coke on Littleton, c. 7 sec. 438; cf. 3 Bl. Comm. 396; *Page* v. *Sutton, Orlop & Co.*, 29 Ark. 304, 306; *Covart* v. *Haskins*, 39 Kan. 571, 574, 18 Pac. 522. These authorities indicate that the word "default" refers to a failure or omission to plead, appear, or attend, cf. *Townsend* v. *United States*, 95 F. (2d) 352, and does not include a refusal to be sworn. In view of the settled necessity of giving a strict construction to a penal statute, the coverage of the statute should not be extended beyond the words used.

(c) The trial court charged the jury that the word "willfully" as used in Tit. 2, § 192 required only that the petitioner had acted intentionally and deliberately, as contrasted with accidentally and inadvertently (R. 172). In accordance with this interpretation, the trial court excluded evidence relative to the petitioner's good faith and lack of bad purpose (R. 118, 122, 126, 127, 133-135, 138, 139, 146, 149, 150). But this statutory construction is in conflict with the decisions of this Court in *United States* v. *Murdock*, 290 U. S. 289; *Hartzell* v. *United States*, 322 U. S. 680; *Screws* v. *United States*, 325 U. S. 91, as well as with the legislative background of the statute. (See 34 Cong. Globe 405, 406, 34th Cong. 3rd Sess., remarks by Representative Orr.)

(d) The trial court and the majority below rejected the petitioner's contention that having been unlawfully arrested and unlawfully brought before the committee against his will he could not be guilty of a violation of Tit. 2, § 192. But the subpoena powers granted to the House Committee do not comprehend the power to order the arrest of prospective witnesses and their forcible appearance before the committee. A witness, such as the petitioner, who is unlawfully arrested and brought before the committee in custody is certainly not "summoned as a witness" within the meaning of Tit. 2, § 192, and, while illegally arrested, cannot be guilty of a wilful default. And as pointed out above, his mere attempt to object to such unlawful arrest should not in any event be considered a wilful default within the meaning of the statute.

(e) All of these issues involving the correct interpretation of Tit. 2 § 192 are questions of first impression before this Court. They are questions of great public importance. With the growing use of Congressional investigating committees, it is imperative that this Court speak authoritatively on the rights of witnesses before such committees and

the extent to which the ordinary elements of due process apply. If Congressional committees are exempt from all procedural requirements, may summarily arrest prospective witnesses, and may arbitrarily deny to witnesses the right to counsel or the right to state legal objections, and still subject witnesses who are denied these rights to the penalties of Tit. 2, § 192, it is for this Court to say so. In addition, since Tit. 2 § 192 is the statute employed to coerce testimony before Congressional committees, such statute should be authoritatively interpreted by this Court. The increasing use of this statute, and the great bulk of litigation which is arising under it demands an early and authoritative interpretation by this Court.

**6. Issues Involving Questions of International Law**

(a) The petitioner contended that, as an alien in transit detained in this country against his will, he was not required to appear and testify before a Congressional committee. The trial court, in rejecting this contention, excluded evidence that the petitioner was an alien in transit detained in this country by governmental authorities against his will. The facts must therefore be considered as established in this record on appeal. The House Committee has authority to summon witnesses and compel testimony only in aid of the formulation of legislation. *Kilbourn* v. *Thompson*, 103 U. S. 168; *McGrain* v. *Daugherty*, 273 U. S. 135; *In re Chapman*, 166 U. S. 661; *Jurney* v. *McCracken*, 294 U. S. 125. The duty to obey such summons is an attribute of allegiance, not of the police power. As an alien in transit, detained in this country against his will, owing full allegiance to another state and only "a local and temporary allegiance" to the United States (*Carlisle* v. *United States*, 16 Wall. 147, 154; *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116, 144; *United States* v. *Wong Kim Ark*, 169

U. S. 649, 693), the petitioner had no such nexus with our legislature as to require him to cooperate with its efforts to formulate legislation.

This issue is one of first impression before this Court and also one of great significance in international law. Surely, if a Congressional committee can detain an alien who touches at a port in this country en route to another, and compel his testimony before a Congressional committee, such conduct would sanction similar action by other countries toward American citizens.

Suppose an American citizen en route to France, touched at an English port. Surely the House of Commons could not, without violating international law, detain him and compel him to testify against his will in order to assist Parliament to determine British foreign or domestic policy. Such a procedure would quite properly arouse indignation in this country, and representations would most certainly be made by our State Department of violations of international law.

The majority opinion below chose to ignore this question, and instead discussed the easier question of the authority of the House Committee over a resident alien (R. 238), an issue not presented by the facts and not argued or briefed below.

(b) It was stipulated at the trial that the petitioner had been arrested and was in custody as an enemy alien at the time he appeared before the Committee (R. 80, 81). The trial court and the majority below, however, rejected the petitioner's contention that such status as an interned enemy alien gave him immunity from questioning by the House Committee. An interned enemy alien is entitled to all the rights of a prisoner of war. Basic Field Manual FM27-10, Rules of Land Warfare at p. 16; Law of Land Warfare prepared by Judge Advocate General's School at p. 47; United States Department of State Bulletin; vol.

VI, No. 152, p. 445, 446, May 23, 1942. By the terms of the Geneva Convention, the petitioner as a prisoner of war could not be required to testify before the Committee. Geneva Convention on Prisoners of War, Article 5; Law of Land Warfare at p. 58; Spaight, "Air Power and War Rights" 340; 2 Oppenheim, International Law (6th edition, Lauterpacht) § 126a, p. 294.

This question is one of first impression before this Court and involves an important principle of international law.

**7. Issues Involving the Constitutionality of the Committee's Authority to Summon Witnesses and to Compel Testimony.**

This case also presents to this Court constitutional issues arising from the face of the statute establishing the House Committee and the manner in which the House Committee has construed and applied the authority given to it. This statute as construed and applied, and the authority of the House Committee to compel testimony under the sanction of punishment for contempt, are unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments and Article I, Section 9 of the Constitution.

These constitutional issues, which are distinct from those previously discussed in this petition, have been twice presented to this Court, which denied certiorari in both cases, *Josephson* v. *United States*, 333 U. S. 838, rehearing den., 333 U. S. 858, *Barsky* v. *United States*, 334 U. S. 843. A petition for rehearing in this latter case is still pending before this Court. Accordingly, we will not here discuss the manner in which the judgment of the Court below on these issues is in conflict with applicable decisions of this Court.

We are unaware of the considerations which have led the Court to deny certiorari in those cases although it is

clear that the denial imported "no expression of opinion upon the merits of the case." *United States* v. *Carver*, 260 U. S. 482, 490.

Nevertheless, this issue of the authority of the Committee requires the consideration of this Court. The decision below in this case, as in the others[9] has decided important questions of constitutional law which have not been, but should be settled by this Court. Approximately fifteen cases in which these issues are involved are now pending in the lower courts, and others will undoubtedly arise in the near future. The subsequent activities of this Committee since this Court's denial of petitions for certiorari have emphasized the extreme public importance of the Committee's role in American life, and the necessity for review of the Committee's authority by this Court. Indeed, the activities of the Committee since this issue was last before the Court, have received the condemnation of the President of the United States as a violation of the Bill of Rights. See Washington Star for August 19, 1948, p. 1, col. 2. And certainly the conduct of the Committee in the present case emphasizes the importance and necessity of review by this Court.

DAVID REIN,
ABRAHAM J. ISSERMAN,
*1105 K Street, N. W.,*
*Washington 5, D. C.;*
CAROL KING,
*220 Broadway,*
*New York 7, New York;*
JOSEPH FORER,
*1105 K Street, N. W.,*
*Washington 5, D. C.*
*Attorneys for Petitioner.*

[9] *Josephson* v. *United States*, 165 F. (2d) 82; *Barsky* v. *United States*, 167 F. (2d) 241.

## APPENDIX A

### Statutes Involved

(a) Rev. Stats. § 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, U. S. C. Title 2, § 192:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

(b) Sec. 21 of Judicial Code, Act of March 3, 1911, c. 231, § 21, 36 Stat. 1090, U. S. C. Title 28, § 25:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit, and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good

faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

(c) Sec. 121 (b), Legislative Reorganization Act of 1946, P. L. 601, c. 753, 79th Cong., 2d Sess., 60 Stat. 828, amends Rule XI (1)(q)(2) of the Rules of the House of Representatives to provide:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.
>
> For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

(d) Article 5 of the Geneva Convention:

Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, or else his regimental number.

If he infringes this rule, he is liable to have the advantages given to prisoners of his rank curtailed.

No coercion may be used on prisoners to secure information relative to the condition of their army or country. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind whatever.

If, because of his physical or mental condition, a prisoner is unable to identify himself, he shall be turned over to the medical corps.